Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

JAMES MCCORMACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: October 17, 2005

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QUESTIONS PRESENTED

Whether the imposition, prior to *United States v. Booker*, 125 S. Ct. 738 (2005), of a sentence under the United States Sentencing Guidelines that exceeded the maximum sentence supported by the facts found by the jury or admitted by the defendant may presumptively be corrected on review for plain error, or whether such an unconstitutional sentence is reversible plain error only in the rare case in which there is affirmative evidence, such as a statement by the trial court, that the court would have imposed a lighter sentence if not bound by the Guidelines.

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James McCormack petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 371 F.3d 22 (App. 1a-9a). Following remand from this Court, the court of appeals again affirmed the defendant's sentence. That decision is unreported and appears at App. 10a-23a.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2005. A timely petition for rehearing and rehearing en banc was denied on July 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under §18 U.S.C. § 3231, which grants exclusive jurisdiction over all offenses against the laws of the United States. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction to review all final decisions of the district courts, and pursuant to 18 U.S.C. § 3742(a)(1), which permits a defendant to appeal a final sentence if it was imposed in violation of law.

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in the appendix to the petition. App., *infra*, 24a-29a.

STATEMENT OF THE CASE

1. The underlying facts

On April 17, 1998, several men kidnapped James Carter, a "retired" drug dealer, took him to a warehouse in Charlestown, Massachusetts, and demanded that he liquidate some mutual funds in order to pay them a ransom. According to Carter, and cooperating witnesses, a firearm was brandished by one or more of the kidnapped. The government presented witnesses who testified that one of the kidnappers fired a bullet through the bumper of Carter's car when he resisted. Carter was released later that same day, and never paid the perpetrators any money.

2. The district court proceedings

In 2000, the government obtained a superseding indictment of the petitioner James McCormack. It alleged that McCormack conspired to violate and attempted to violate the Hobbs Act, 18 U.S.C. § 1951 in connection with the kidnapping of Carter. In addition, the superseding indictment alleged that McCormack used and carried a firearm during and in relation to a crime of violence – the Hobbs Act kidnapping. 18 U.S.C. § 924(c).

After a five day jury trial McCormack was convicted of conspiring to violate and attempt to violate the Hobbs Act. He was acquitted of the count charging use and carrying a firearm in relation to a crime of violence.

At sentencing, the district court determined that the base offense level was 18, and that enhancements should be added because of an express or implied threat of death (two levels), a ransom demand between $50,000 and $250,000 (two levels), the victim suffered bodily injury (two levels), and the victim was abducted (four levels). In addition, the court added a seven

level enhancement because a firearm was discharged. The defendant objected that the seven level enhancement was prohibited by this Court's earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), since he had been acquitted of that charge by the jury. The district court overruled the objection, calculated that the guideline sentencing range was 188 to 235 months, and imposed a sentence at the low end of the range – 188 months.

3. Proceedings on appeal

On appeal, in light of this Court's decisions in *United States v. Watts*, 519 U.S. 148 (1997), and *Harris v. United States*, 536 U.S. 545 (2002), the petitioner argued that the sentencing guidelines, as applied to the facts of the petitioner's case, were inconsistent with the statutory mandate in 28 U.S.C. § 994(f) that the Sentencing Commission was to issue guidelines "providing certainty and fairness in sentencing and reducing unwarranted disparity."

Petitioner based his argument on the perverse result that his sentence under the guidelines was 41 months longer because he was acquitted of the § 924(c) charge than if he had been convicted. The anomaly occurs because the petitioner would have received a sixty month sentence if he had been convicted of the 924(c) charge, but, since he was acquitted, the Sentencing Guidelines required the sentencing court to impose a seven level increase in petitioner's offense level under the Hobbs Act Guideline. That resulted in an increase of 101 months in the defendant's sentence (or 41 months more than if he had been convicted of the 924(c) offense). *See* U.S.S.G. §§ 2B3.2 and 2K4.2. While conceding that petitioner's argument had "common-sense appeal, especially to anyone not familiar with the specialized world of the federal sentencing guidelines," the First Circuit affirmed, holding that petitioner could not show that he was harmed.

4. Proceedings after remand

A timely petition for a writ of certiorari was filed. This Court granted the writ, vacated the judgment and remanded for consideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005). On remand, the circuit court again affirmed the conviction and sentence, finding that under the applicable First Circuit caselaw, *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005), the defendant failed to show a reasonable likelihood that the district court would have given him a lower sentence had it treated the guidelines as advisory, rather than madatory.

REASONS FOR GRANTING THE PETITION

I. There is a Clear Conflict Among the Circuits on the Proper Disposition of Plain Error Claims under *Booker*.

In the nine months since the Court decided *Booker*, the circuit courts have been thrown into conflict over the recurring question whether the imposition, under the pre-*Booker* mandatory Sentencing Guideline regime, of a term of imprisonment longer than the maximum sentence authorized under the Sentencing Guidelines by the facts found by the jury or admitted by the defendant constitutes plain error requiring a remand for re-sentencing. The focal point of the dispute has been the third prong of the traditional plain error test – *i.e.*, whether *Blakely/Booker* error is deemed to have affected the defendant's substantial rights. The First Circuit, as well as the Fifth, Eighth, Tenth, and Eleventh, have adopted a rule under

which such errors will almost never result in re-sentencing.[1] The Third, Fourth, and Sixth Circuits have held that such errors will almost always result in re-sentencing.[2] And the D.C., Second, Seventh, and Ninth Circuits have held that the district court in each case must determine whether re-sentencing is appropriate.[3]

While this doctrinal chaos may soon fade into distant memory as "pipeline" cases are disposed of, it exacts a terrible human toll on those defendants who have the misfortune to have been unconstitutionally sentenced in the First, Fifth, Eighth, Tenth, and Eleventh Circuits – a vast swath of the country. In addition, it results is startlingly disparate results among similarly situated defendants – based only on the happenstance of where they were prosecuted. The continued existence of this conflict promotes a pervasive, baseless disparity that this Court should remedy.

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[1] *United States v. Antonakopoulos*, 399 F.3d (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir.), *cert. denied*, ___ S. Ct. ___, 2005 WL 816208 (U.S. Oct. 11, 2005)(N0. 04-9517); *United States v. Pirani*, 406 F.3d 543 (8th Cir.)(*en banc*), *cert. denied*, ___ S. Ct. ___, 2005 WL1811058 (U.S. Oct. 3, 2005)(No. 05-5547); *United States v. Lawrence*, 405 F.3d 888 (10th Cir.), *cert. denied*, ___ S. Ct. ___, 2005 WL 2494188 (U.S. Oct. 11, 2005)(No. 05-6306); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005).

[2] *United States v. Davis*, 397 F.3d 173 (3rd Cir.), *en banc rev. denied*, 407 F.3d 162 (3rd Cir. 2005); *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005); *United States v. Milan*, 398 F.3d 445 (6th Cir. 2005).

[3] *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005); *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005)(*en banc*).